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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 413

DIXIE GREYHOUND LINES, INC., ET AL.,
Petitioners,

vs.

LAMAR C. ATKINSON AND ROSS R. BARNETT.

PETITION FOR WRIT OF CERTIORARI, WITH BRIEF THEREUPON, TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

LONGSTREET HEISKELL,
WILLIAM H. WATKINS,
P. H. EAGER, JR.,
THOMAS H. WATKINS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

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No. 413

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vs.

LAMAR C. ATKINSON AND ROSS R. BARNETT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Dixie Greyhound Lines, Inc., Teche Lines, Inc., and W. H. Watkins and P. H. Eager, Jr., their sureties, petitioners, as against Lamar C. Atkinson, plaintiff in the District Court of the United States for the Southern District of Mississippi, and Ross R. Barnett, surety on his appeal bond from the District Court, called respondents.

A.

Summary Statement of Matters Involved.

1. The suit was filed in the United States District Court for the Southern District of Mississippi by Lamar C. At-

kinson, plaintiff, hereinafter referred to as respondent, against the Dixie Greyhound Lines, Inc. and the Teche Lines, Inc., petitioners herein. The petitioners were interstate common carriers, operating passenger busses through the State of Mississippi. The Dixie Greyhound Lines, Inc., hereinafter referred to as the "Dixie", maintained a union station in the City of Jackson, Mississippi, where its busses carrying passengers stopped for putting off and taking on passengers. The facilities of the station for such purposes were used by the Teche Lines, Inc., one of the petitioners, hereinafter referred to as "Teche Lines", and was likewise used by a third common carrier of passengers by busses. The respondent, Atkinson, plaintiff in the District Court of the United States, alleged that on the night of January 27, 1940, intending to become a passenger on one of the busses going south from the station maintained by Dixie, went into the station about one o'clock A. M., was informed that the next bus went south at four thirty A. M., took his seat in the station, thereby alleged that he became a passenger and was entitled to be protected as such, and that some time later, the night ticket agent wrongfully called policemen to the station, had him arrested and taken to the Municipal Court where he was detained for some time. Wherefore, he sued for the wrongful arrest, detention, inconvenience, humiliation, etc., claimed to have been suffered in violation of his right as a passenger, including exemplary damages (R. 1-14).

Issue was taken thereupon. The case was tried, and at the conclusion of the respondent's testimony, verdict was directed for the petitioners. On motion for new trial, the District Judge held that under the case of *Andrews* v. *Railroad Company*, 86 Miss. 129, 38 So. 773, the respondent was not a passenger and the petitioners owed him no duty. Appeal was taken to the United States Circuit Court of Appeals, Fifth Circuit, and the judgment of the court below

was reversed. *Atkinson* v. *Dixie Greyhound Lines, Inc.*, 125 Fed. (2d) 237 (R. 4). The case was re-tried in the United States District Court. At the second trial, the respondent's testimony was substantially the same as that introduced on the former appeal, and the petitioners thoroughly developed their defenses. A judgment was rendered in favor of the respondent against petitioners for the sum of Five Hundred Dollars ($500.00) actual damages. The respondent prosecuted an appeal to the United States Circuit Court of Appeals, Fifth Circuit, because of the alleged refusal of the District Judge to submit to the jury the question of exemplary damages, and petitioners took a cross-appeal. The petitioners requested a directed verdict at the conclusion of respondent's testimony (R. 69); moved for a directed verdict at the conclusion of all of the testimony (R. 120), to which action of the court petitioners excepted (R. 136). The respondent filed motion for a new trial only on the question of exemplary damages (R. 142). The petitioners filed a motion for a new trial and for judgment notwithstanding the verdict, and motion for a new trial in the alternative (R. 149). Appropriate exceptions were noted by petitioners to the action of the court.

On cross-appeal to the United States Circuit Court of Appeals the petitioners urged as error and as ground for reversal that they were not liable to the respondent, and judgment should have been entered in their favor at each stage in the proceedings for the following reasons, all of which questions are presented and involved in this application for certiorari.

1. Respondent, Atkinson, entered petitioners' station three and one-half hours before the arrival of the next bus going south, upon which he desired to take passage, and, therefore, was not a passenger, but at the utmost was a licensee subject to ejection at any time.

2. Between the hours of one o'clock A. M. and seven o'clock A. M. persons were not permitted to remain in the station unless such persons acquired a ticket. This respondent refused to do so upon request, the petitioners asserting that the rule was a valid one in the interest of the public and that, in any event, the respondent might have avoided any controversy by purchasing a ticket and preventing his ejection.

3. The night ticket agent was without authority to cause the respondent's arrest, if he did so, which is denied.

4. The petitioners' night ticket agent did not instigate the arrest of respondent but that the same was had by officers called to the station for reasons of their own.

5. Under no circumstances were petitioners liable for exemplary damages.

The facts in the case were largely undisputed. We will direct the attention of the court to such conflict as there was. The respondent lived some ten or twelve miles south of Jackson, Mississippi, on Highway 51, was working at a restaurant in the suburbs of Jackson. About one o'clock in the morning of January 27th, he went to the union station owned by the Dixie and used by both petitioners; the respondent in going to his home would travel over the Teche Line. The night was cold; he has been working some sixteen and one-half hours. On entering the station, he went to the ticket window where the night agent was on duty. The respondent did not ask to purchase a ticket, merely asked such employee what time the next bus went south and was informed that such bus would go south at 4:30 o'clock. Respondent claims that he had $1.00 in his hand to purchase a ticket which would cost twenty-five cents, but admits that he did not ask the agent for a ticket. It appeared from the proof that it was not unusual for persons

coming into the station to go to the ticket window and ask of the arrival of a bus, but that such inquiry would not indicate the purpose of the inquirer to remain in the station during the period (R. 23-25). Assuming that the respondent had money in his hand, he did not so inform the ticket agent or hold it so that it could be seen. Respondent was of the opinion that the night ticket agent was acquainted with him since he customarily took that route home after his day's work (R. 25) (R. 40). Cross-examination of Billingsley (R. 2, 3, 4, 5). The night was very cold; respondent was tired and determined to remain in the station until the arrival of the southbound bus. He went upstairs on the mezzanine floor, a quiet place, where there was a wash room and lavatory. There were benches on the mezzanine floor. The respondent availed himself of the facilities of the mezzanine floor and admittedly went to sleep on a bench. That is to say, he was using the petitioners' facilities as a substitute for a hotel. Persons were not permitted on the mezzanine floor, however, unless such persons had previously purchased a ticket (Supplemental Record 6, R. 166). The Dixie operated the union station at Jackson, Mississippi, furnished the employees and permitted other carriers to use it. It promulgated a rule to the effect that persons coming into the station from one to seven o'clock in the morning must purchase a ticket if such person desired to remain in the station, otherwise would be required to leave. This rule was had and enforced for sanitary reasons, especially in very cold weather where the presence of loafers and other unauthorized persons would create conditions not desirable. Not only that, but the presence of licensees or trespassers would render the effects of passengers subject to theft, and women passengers might be accosted and insulted by strange men. This rule was uniform in its application throughout the Greyhound System, as well as other bus systems, and was had by railroad companies. The

union station at Jackson, Mississippi (with a population of some seventy thousand people), was maintained by the Dixie for its own use and other bus carriers, some twelve hundred passengers passing through the station daily. The Dixie at times had experimented with a relaxation of the rule requiring persons between one o'clock and seven o'clock to buy tickets, and found that the station was filled with loafers especially during cold weather, and that there arose complaints of the theft of baggage, and women passengers complained of being insulted by strange men. These facts were undisputed. Billingsley, direct examination (R. 52), (R. 58); Billingsley, cross-examination (Supplemental Record 1, R. 161); A. J. Emery (R. 100) (R. 104). In view of this rule, respondent having come into the station at one o'clock A. M., the overwhelming weight of the testimony showed that Billingsley, the night ticket agent, went to him three times and requested him to buy a ticket, to which the respondent replied that he was going south to Byram, would get a ticket when he saw fit. Whereupon, Billingsley, purely for the purpose of having respondent ejected from the station unless he should buy a ticket, requested police headquarters to send a policeman to the station.

At this point, we call the attention of the Court to a slight conflict in the testimony. Shortly after the suit was filed, under the Federal Rules, petitioners gave notice of their desire to take the deposition of respondent in order that petitioners might prepare their defense. The testimony was taken and the respondent, under oath, testified that the ticket agent requested him three times to purchase a ticket, which he refused to do, and that the only controversy he had with the ticket agent was over his refusal to acquire a ticket, and that this conduct on his part was reported to the policeman in his presence, that he was ejected from the station solely because he refused to buy a ticket, and had no other

controversy with the ticket agent. This examination took place in the presence of respondent's counsel (R. 109-118). However, at the trial of the case, the respondent testified that respondent denied giving any such testimony, and testified that Billingsley came to him on the mezzanine floor, asked him where he was going, and told him that he had until four thirty to get a ticket. The policemen arrived at the station, found the respondent asleep on the mezzanine floor, and according to their testimony, awoke him and three times told him he must get a ticket or they would take him from the station. This he declined to do. Respondent denied that anything was said to him about buying a ticket, and that when the policemen came up, the ticket agent said that he had been loafing around there for several days. The policeman testified that the respondent was in a disheveled condition, wouldn't give him his name, wouldn't tell him where he was going, refused to buy a ticket, and that he had the appearance of being under the influence of liquor or a narcotic; and that without any suggestion on the part of Billingsley, the ticket agent, they searched him, took him to police headquarters some four blocks away, no charge was preferred against him; some policeman came up who knew the respondent and said that he was harmless but peculiar and requested that he be discharged; and the policeman offered to take him back to the station or let him spend the night in the Municipal Courtroom. There is a very strong inference in the record that he did so. Barney Fitzpatrick (R. 75-77); J. B. Hines (R. 90-98). The respondent was a highly interested witness, his testimony was corroborated in no particular, and was contradicted not only by his own sworn examination but by convincing, independent, disinterested testimony. The trial judge submitted the case to the jury, and the jury returned a verdict for $500.00 in favor of the respondent. Both sides appeal. The United States Circuit Court of Appeals, Fifth Circuit, affirmed the

case on cross-appeal, as well as direct appeal, except as to the question of exemplary damages, and remanded the case to be tried on that issue alone (R. 175).

B.

Basis upon Which It Is Claimed this Court Has Jurisdiction.

The jurisdiction of this court is invoked under Judicial Code, Section 240, as amended by Act of Feb. 13, 1925, 43 Stat. 938, Section 347, 28 U. S. C. A.

C.

Specifications of Error and Questions Presented.

There is presented under this petition the action of the United States Circuit Court of Appeals in affirming the judgment appealed from on cross appeal and reversing the direct appeal as to exemplary damages. Petitioners submit that the United States Circuit Court of Appeals erroneously affirmed the case on petitioners' cross appeal and erroneously reversed the case on respondent's direct appeal on the question of exemplary damages, for the following reasons, to-wit:

1. The Court of Appeals rendered a decision at variance with applicable decisions of the Supreme Court of Mississippi in the following particulars, to-wit:

(1) The court erroneously held that the question as to whether or not respondent was a passenger was a question for the jury, whereas, under the applicable decisions of the Supreme Court of Mississippi, respondent was a trespasser, and at best, a licensee, subject to eviction at any time, respondent having gone into the bus station more than three hours prior to the arrival of the bus for purposes of his own and refused to buy a ticket when requested, as provided by the rules and regulations of petitioners.

(2) The court erroneously held that under the evidence the jury was justified in finding that Billingsley, the ticket agent, instigated the arrest of respondent.

(3) The court erroneously held that the jury was justified in finding that Billingsley acted in the scope of his employment in causing the arrest of respondent, if, in fact, he did so.

(4) The court erred in holding that the petitioners were liable to the respondent for damages and in sustaining the judgment rendered against them in the District Court.

(5) The court erred in holding that the evidence justified the submission to the jury the question of petitioners' liability for exemplary damages and the reversal of the direct appeal to such extent.

(6) The court committed error in holding that under Federal Rule 59 the case should be reversed to be tried anew upon the question of exemplary damages alone, whereas, there should have been a general reversal.

(7) The court committed error in failing and refusing to reverse the case on direct appeal and direct a verdict for petitioners.

D.

Reasons for Allowing Writ of Certiorari with Citation of Cases Supporting the Jurisdiction of the Court.

This is an appropriate case for the granting of a writ of certiorari by this court. The questions involved are of public importance arising under the laws of the State of Mississippi, as well as important questions of Federal Law.

1. As to the questions of Mississippi Law involved, its decisions are controlling and, as hereinbefore set out, the decision of the United States Circuit Court of Appeals, Fifth Circuit, is at variance therewith. The questions of Mississippi Law involved are of public importance. Peti-

tioners are common carriers of passengers, and under the law there is imposed a very high degree of care upon them in the protection of the health, persons, property and sensibilities of passengers. Petitioners would be greatly embarrassed in the discharge of their important obligations to the public if they may be held liable to a mere licensee in the union station, admittedly using such station as a substitute for a hotel, pending the arrival of a bus not due to arrive for three and one-half hours. This court has frequently granted writs of certiorari involving important questions of State Law. The following cases are illustrative: *James Lanier Bell, Petitioner,* v. *Preferred Life Assurance Society of Montgomery, Alabama,* —— U. S.——, decided November 8, 1943, 88 L. Ed., Advance Sheets 6; *W. J. Meredith, et al., Petitioners,* v. *City of Winter Haven,* decided November 8, 1943, —— U. S. ——, 88 L. Ed., Advance Sheets 1; *Magnolia Petroleum Company* v. *Sullivan H. Hunt,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 161; *Irene Brady, Admrx.,* v. *Southern Railway Company,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 189; *William J. Demorest, Jr.* v. *City Bank Farmers Trust Company, Trustee,* decided January 17, 1944, —— U. S. ——, 88 L. Ed., Advance Sheets 340; *Goodyear Tire & Rubber Company, Inc.* v. *Ray-O-Vac Company,* decided February 28, 1944, —— U. S., ——, 88 L. Ed., Advance Sheets, Page 475, (holding that the court would sometimes examine the evidence, although approved by two courts); *J. M. Sartor, et al.,* v. *Arkansas Natural Gas Corporation,* decided March 27, 1944, —— U. S., ——, 88 L. Ed., Advance Sheets 597; *Crites, Inc.* v. *Prudential Insurance Company,* decided May 22, 1944, —— U. S. ——, 88 L. Ed., Advance Sheets 989; *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290; *Stoner* v. *New York Life Insurance Company,* 311 U. S. 464, 85 L. Ed 284.

2. The case involved also an important question of Federal Law never before decided by this court, or any United States Circuit Court of Appeals, as to whether or not under the Seventh Amendment to the Constitution of the United States, guaranteeing trial by jury, under Rules of Civil Procedure, 59, a case may be reversed to be tried only upon the queston of punitive damages, whereas, here, the new trial upon such question would involve every issue of fact presented on the original trial, and great injustice would probably be done the petitioners. The petitioners file herewith ten printed copies of the record as printed below, together with the proceedings and opinion in the United States Circuit Court of Appeals.

3. And for other reasons appearing there to be assigned at the hearing.

WHEREFORE, petitioners pray for a writ of certiorari from this Honorable Court, directed to the United States Circuit Court of Appeals, for the Fifth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day therein named, a full and complete transcript of the record and all proceedings in the case of *Dixie Greyhound Lines, Inc.* and *Teche Lines, Inc. v. Lamar C. Atkinson,* Cause No. 10, 662 on the docket of the Court, and that said judgment of said Court may be reversed and petitioners afforded appropriate relief.

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No. 413

DIXIE GREYHOUND LINES, INC., ET AL.,
Petitioners,

vs.

LAMAR C. ATKINSON AND ROSS R. BARNETT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

The opinion of the U. S. Circuit Court of Appeals, on first appeal, in this case is reported in 125 Fed. (2) 237, copy of which is filed as Appendix hereto. The decision of the Circuit Court of Appeals in this case on the second appeal, wherein the judgment appealed from was rendered, has not been officially reported, but copy thereof is attached hereto as Appendix.

II.

Jurisdiction.

The date of the judgment to be reviewed was entered June 7, 1944 (R. 175). Petition for rehearing filed and denied June 22, 1944 (R. 220).

Jurisdiction is sustained under the following cases: *James Lanier Bell, Petitioner v. Preferred Life Assurance Society of Montgomery, Alabama,* —— U. S. ——, decided November 8, 1943, 88 L. Ed. Advance Sheets 6; *Magnolia Petroleum Company* v. *Sullivan H. Hunt,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 161; *Irene Brady, Admrx.,* v. *Southern Railway Company,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 189; *William J. Demorest, Jr.* v. *City Bank Farmers Trust Company, Trustee,* decided January 17, 1944, —— U. S. —— 88 L. Ed., Advance Sheets 340; *J. M. Sartor, et al.,* v. *Arkansas Natural Gas Corporation,* decided March 27, 1944, —— U. S. ——, 88 L. Ed., 597, Advance Sheets; *Crites, Inc.* v. *Prudential Insurance Company,* decided May 22, 1944, —— U. S. ——, 88 L. Ed. 989, Advance Sheets.

III.

Statement of the Case.

Reference is made to summary statement of matters involved, *supra,* in the petition for certiorari. Supplemental statements will be made in this brief and argument.

IV.

Specifications of Error.

Errors relied on with reasons for granting writ are fully set forth in petition for certiorari, reference to which is made.

Argument.

Point I.

This Case Is Controlled by the Laws of the State of Mississippi.

The respondent filed this suit in the District Court of the United States although he was a citizen and resident

of Hinds County, Mississippi, might have filed his suit in the Circuit Court of the County in which he resided, and while he had a perfect right under the law to file his suit in the United States District Court on account of diversity of citizenship, he may not thereby escape the Laws of the State of Mississippi. From recently reported cases of this court, the following rules may be deduced: The Federal Courts have no common law as such, and where trials are had in District Courts, the common law must be ascertained from state decisions. The Federal Court must be industrious to ascertain and apply the state law. This is true although the Federal Court may believe the state rule to be erroneous and that a more correct rule should prevail. The Federal Court should use every effort to correctly ascertain the state law. It may look not only to the decisions of the highest appellate court, but to the decisions of intermediate courts, even to the decisions of trial courts, and as a last resort may look to the decisions of Federal Courts held in the state, since such Federal Judges are ordinarily members of the bar of the state, even after a case has been decided by this court, or a United States Court of Appeals, it is the duty of the court to follow a subsequently rendered state decision. The following cases are directly in point: *Erie Railroad Company* v. *Tompkins*, 82 L. Ed. 1188, 304 U. S. 64; *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Wichita Royalty Company* v. *City National Bank of Wichita Falls*, 306 U. S. 103, 83 L. Ed. 515; *Russell* v. *Todd*, 309 U. S. 280, 84 L. Ed. 754.

POINT 2.

The Respondent Was Not a Passenger. Petitioners Owed Him No Duty and Are Not Liable to Him for Damages.

Admittedly, the Respondent went to Petitioners' union station at one o'clock in the morning. He was immediately

informed that the bus would not go south until three and one-half hours later, to-wit 4:30 A. M. The night was cold, with snow on the ground. He had been working for sixteen and one-half hours. For purposes of his own, he went to the mezzanine floor of the station, availed himself of the facilities therein afforded, went to sleep upon a bench situated on the mezzanine floor, although persons were not admitted to the mezzanine floor unless such person held a ticket. The Court of Appeals in its opinion held that Respondent went into the station, walked to the ticket window, held up $1.00, requested the agent to give him a ticket, to which the agent replied the bus would not go south until 4:30. This statement in the court's opinion is contrary to the undisputed proof. Respondent did go to the window, asked what time the bus went south, but according to the undisputed proof did not ask for a ticket or indicate in any manner that he wished to purchase the same. The ticket agent gave him the information called for, which was not an infrequent inquiry, but was not aware of the fact that he intended to remain in the station until the bus arrived. (R. 25; R. 38; R. 40; Billingsley Cross-examination, Supplemental Record R. 2-8, R. 161-168). This question has been determined adversely to Respondent by the Supreme Court of Mississippi. The case of *Andrews* v. *Y. & M. V. R. Company*, 86 Miss. 129, 38 So. 773, is controlling. There, the appellant went to the station two hours before the arrival of the train. The agent let him come on the inside where he could have a warm, quiet place to do some writing. He and the agent got into an argument, as the result of which the agent assaulted the appellant. It was conceded that the appellant intended to take a train upon its arrival. The Court held that there was no liability, using the following language: "Appellant, according to his own statement, did not resort to the depot for the purpose of *then* securing passage upon a train, nor with the inten-

tion of establishing the relation towards the appellee of passenger and carrier. Giving his statement the most far-reaching effect and the broadest meaning of which his language admits, while his intention was ultimately to take passage when the train not due for several hours should arrive, the prime object of his going to the depot at that hour was that he might have a comfortable and convenient place in which to transact the business of writing up his daily insurance reports—a strictly private matter."

The District Judge, after having directed the verdict for the Petitioners on the first trial, on motion for a new trial, used the following language: "The nearest Mississippi case I have come across is that of *Andrews v. Y. & M. V. R.*, 83 So. 773. When Andrews went to the depot more than two hours before his train was due he was intending to catch the train, but while he was waiting he went into the private office of the agent to do some work of his own and while there he got into a controversy with the agent. The court properly held in that case that the relationship of passenger and carrier did not exist."

The Circuit Court of Appeals justified the conclusion which it reached by citing the case of *Metcalf* v. *Railroad Company*, 52 So. 355, 97 Miss. 455. In that case, the decedent went to the station to take a train due in ten or fifteen minutes. He had a grip in his hand and a mileage book in his pocket. He went into the station, deposited the grip, started out of the station intending to return in a few minutes. As he stepped out of the door, he fell into an excavation, negligently placed there by the railroad company, receiving injuries from which he died. The Court held as a matter of law that he was a passenger. However, the case of *Andrews* v. *Y. & M. V. R. Company*, *supra*, was reexamined and reaffirmed. The doctrine was reexamined by the Supreme Court of Mississippi in the case of *G. M. & N. R. Company* v. *Sparkman*, 180 Miss. 456, 177 So. 760,

wherein the Court used the following language: "A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such a passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his honor. 1 Fetter, Carr. Pass., Sec. 228. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier." In that case, the case of *Andrews* v. *Y. & M. V. R. Company* was cited with approval. It will be noted that the Supreme Court of Mississippi has definitely decided that the person, in order to become a passenger, must go to the station, *then* intending to take a train; not a person going to a station who is tired and worn out who wishes to use the lavatory and wash up and take a nap and rest until the train comes in three hours and one-half later. In the case of *Thomas* v. *Bush,* (Mo.) 200 S. W. 301, the court used the following language: "It is said in the case of *Sweany* v. *Railroad*, 167 Mo. App. loc. cit. 141, 151 S. W. 198: 'A depot building is not maintained as a rooming house or lounging place. It is intended as a waiting room for passengers for the reasonable time which should be allowed passengers for coming to it and making ready to depart on an in-coming train, or to wait for delayed trains.' In order for the relation of passenger and carrier to exist in cases of this kind it is necessary that the intending passenger come to the station, and within the implied care or control of the carrier, a reasonable time before the departure of the train by which he is to travel. The right to enter and remain at a railroad station extends only so

far as is reasonably necessary to secure to the traveler the full and perfect exercise of his right to be carried upon the cars, and what is a reasonable time will depend upon the circumstances of each particular case; one's right to remain at a railroad station depends on his intent to take a train *expected soon to leave.*

We have made as an Appendix to this brief the Mississippi Statute regulating the time within which stations must be kept open for passengers prior to the arrival of the train. By analogy, the rule would be applicable to respondent. In the opinion of the Circuit Court of Appeals, it is stated that respondent was known to persons in Jackson and was in the habit of purchasing a ticket every night in the bus station. The respondent was unwilling to state that Billingsley knew who he was and stated that he did not know Billingsley's name (R. 38). Billingsley swore undisputedly that he had no knowledge of ever having seen respondent in the station and a large number of persons passed through and were waited on every night. The Circuit Court of Appeals, in its opinion, called attention to the fact that respondent testified that while he was on the mezzanine floor Billingsley came to him, asked him where he was going, and told him he had until 4:30 to get his ticket. This statement was in direct conflict with respondent's testimony when examined under the equity rules, was contradicted by Billingsley and was at variance with every fact and circumstance in the case; but even if such statement is assumed to be true, under the case of *Andrews* v. *Y. & M. V. R. Company,* the agent did not have authority to convert a trespasser or licensee into a passenger, and at the utmost, Respondent was a mere gratuitous licensee, subject to eviction at any time without cause or notice. *Carson* v. *State,* 123 Miss. 702, 86 So. 460; *Belzoni Oil Works* v. *Y. & M. V. R. Company,* 94 Miss. 50, 47 So. 468. In the case of *Andrews* v. *Y. & M. V. R. Company,* supra, the agent knew that the

appellant had come into the station to await the arrival of a train and consented thereto as fully as he might but could not bind the appellee.

POINT 3.

Billingsley, the Night Ticket Agent, Was Without Authority to Arrest or Prosecute the Respondent, if in Fact He Did so, which Is Denied.

Billingsley was merely a night ticket agent, was on duty eight hours engaged in selling tickets and looking after the building. It was his duty to see that persons remaining in the station between one o'clock A. M. and seven o'clock in the morning should be provided with tickets. If such persons were not so provided, it was his duty to call a policeman and acquaint such officer with the actual facts. He would expect, however, that the officer would ask the person to buy a ticket or leave the station. Billingsley had never before had anyone arrested or instituted a criminal proceeding of any kind. It appeared that upon one occasion, under similar circumstances, he had telephoned for a policeman. It does not appear, however, that an arrest was made under such circumstances. These facts appear undisputed from the direct testimony of William D. Billingsley (R. 52); Cross-examination of Billingsley, Supplemental Record, and the testimony of A. J. Emory (R. 100). This testimony was not disputed. The U. S. Circuit Court of Appeals was critical of Mr. Emory's testimony because it said that it consisted of conclusions of law. We submit, however, that no objection was made by opposing counsel thereto in the trial court. The District Judge interposed no objection, and if Mr. Emory's testimony was composed in part of conclusions of law, the same was developed by Respondent's counsel to the same extent as by Petitioners'. There is nothing to reflect upon his testimony, and we submit that

the objection is without justification. Under the decisions of the Supreme Court of Mississippi, Billingsley was without authority to cause the arrest of the Respondent or institute criminal proceedings against him. Under the law of the State of Mississippi, it was not necessary for Petitioners to negative the lack of authority on the part of Billingsley to arrest or prosecute Respondent. Upon the other hand, the burden of proof throughout the case rested upon Respondent to prove by the preponderance of evidence the authority upon the part of Billingsley to have him arrested or prosecuted. In the case of *Brown* v. *Kisner*, 6 So. (2) 611, 192 Miss. 746, the Supreme Court of Mississippi held that a plantation manager, having in charge the plantation with all of its properties, and who had control of the tenants upon the property, was without authority to have arrested or institute criminal proceedings against a person, without permission, coming upon the place and removing tenants without paying the debts of such tenants. In the case of Fisher v. Westmoreland, 101 Miss. 180, 57 So. 563, it was held that an agent in charge of the principal's property, with authority to care for and sell the same, could not render the principal liable for causing a person to be arrested for stealing the same. In the case of *Russell* v. *Palentine Insurance Company*, 106 Miss. 290, 63 So. 644, it was held that a fire insurance company was not liable for the act of its state agent charged with the duty of collecting agency balances who instituted criminal proceedings against a defaulting agent. In the case of *Young* v. *Price Mercantile Company*, 167 Miss. 409, 148 So. 643, the Supreme Court held that the principal was not liable for the act of a state manager in charge of its property who caused a person to be arrested for theft. And, in the case of *State Life Insurance Company* v. *Hardy*, 195 So. 708, 189 Miss. 266, the Court held that a life insurance company was not liable for the act of a state agent, charged with the duty of preserving

its property and collecting its rents, for instituting criminal proceedings against a tenant for removing agricultural products from the premises. The foregoing decisions rest upon the philosophy that the authority of an agent to cause the arrest or prosecution of a third person must be express or necessarily implied from the duties of the agent.

POINT 4.

Billingsley, the Ticket Agent, Did Not Instigate the Arrest of the Respondent.

The U. S. Circuit Court of Appeals in this case said in its opinion that Billingsley caused the arrest of Respondent by calling the policeman. The test is not whether Billingsley called the policeman and the arrest of the Respondent subsequently resulted. The test is as to whether or not Billingsley instigated the arrest or prosecution of Respondent, and the evidence is undisputed that Billingsley did neither. According to the testimony of Billingsley, and the two policemen who answered the call, Fitzpatrick and Hines, upon their arrival Billingsley said, pointing out Respondent, "He won't buy a ticket, he won't get out." According to the testimony of Respondent, the only thing Billingsley said was "Here is a man who has been loafing around here for several days." It was admitted that Billingsley did not charge the Respondent with any crime, since loafing around the station was not a crime, he did not ask the policemen to arrest Respondent, and he did not ask the policemen to prosecute Respondent. Taking the testimony of Respondent, the only thing which Billingsley said was "The man has been loafing around here for several days." That was no crime, and that is all Billingsley did, according to the testimony of Respondent himself. The policemen testified undisputedly that they were not satisfied with the Respondent, that he appeared to be under the influence

either of intoxicating liquors or a drug, and that he refused to give any account of himself and they took him to the station for an examination. It may be that the policemen were wrong. Be that as it may, it was undisputed that such action as that which took place was not done at the request or suggestion of Billingsley. Atkinson, r. 27; Billingsley, r. 56-58; Supplemental Record, r. 2-6, R. 162-166; Fitzpatrick, r. 75; r. 88; J. B. Hines, r. 90-98. In order to instigate an arrest, more is required than the mere calling of an officer. In order to instigate an arrest, the party charged therewith must have charged the party with a crime and request his arrest therefor. The rule is aptly stated in Rest. of Law of Torts, Vol. 3, Page 383, where the following rule is announced: "The giving of the information or the making of the accusation however, does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit." The following authorities are directly in point: Am. Jur., Sec. 33, p. 375; *Rush* v. *Buckley*, 100 Me. 322, 61 A. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; *Barker* v. *Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457; *Shinglemeyer* v. *Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; *Tillman* v. *Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; *Gifford* v. *Wiggins*, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; *Boeger* v. *Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; *Whaley* v. *Lawton*, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649; *Smith* v. *Clark*, 37 Utah, 116, 106 P. 653, 26 L. R. A. (N. S. 953, Ann. Cas. 1912B, 1366; *Marks* v. *Sullivan*, 8 Utah 406, 32 P. 668, 20 L. R. A. 590; *Langan* v. *Borkowshi*, 188 Wis. 277, 206 N. W. 181, 43 A. L. R. 622; *Gelzenleuchter* v. *Niemeyer*, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616; Annotation: 18 L. R. A. 356, 357; 10 Am. St. Rep. 326; Ann. Cas. 1915B 1373; *Vimont* v. *S. S. Kresge Co.*, 291 S. W. 159; *Greaves* v.

Kansas City Junior Orpheum Co., 80 S. W. (2) 228, 229 Mo. App. 663. There are several decision from the Supreme Court of Mississippi deciding what conduct constitutes the instigation of an arrest or a prosecution. These cases are cited in the opinion of the U. S. Circuit Court of Appeals. *Howell* v. *Veiner*, 179 Miss. 872, 176 So. 731. A storekeeper called a policeman, falsely charged two persons with counterfeiting and expressly requested the policeman to arrest the alleged counterfeiters. Such conduct constituted the instigation of a criminal prosecution. In the case of *I. C. R. Company* v. *King*, 13 So. 824, 69 Miss. 852, the depot agent of the railroad company arrested plaintiff while he was a passenger in the defendant's station, delivered him to a policeman, and at the agent's request, the plaintiff was taken to jail where he remained in custody twenty-four hours. There was no question as to the authority of the agent. However, such agent necessarily instigated the arrest. In the case of *Bacon* v. *Bacon*, 76 Miss. 458, 24 So. 968, a physician falsely certified that the plaintiff was insane. Such certificate was made with the view and for the purpose of having her confined in an asylum. In the case of *A. & V. R. Company* v. *Kuhn*, 78 Miss. 114, an agent of the railroad company, having authority to do so, instituted a criminal prosecution against the plaintiff. The plaintiff complained to the superintendent of the railroad company who ratified what the agent had done. In the case of *Laster* v. *Chaney*, 180 Miss. 110, 177 So. 524, the appellee, a private individual, purposely and intentionally preferred charges against the appellant Laster, had him arrested by the sheriff and placed in jail. In the instant case, Billingsley did not do anything except call an officer, with a view to having Respondent ejected from the station unless he bought a ticket. He made no charge against him, did not request that he be arrested and did not go with the policemen to the Municipal headquarters.

He knew that the policemen took the Respondent out of the station but assumed that no action was being taken, and that it was because Respondent did not buy a ticket. We submit that Billingsley did not instigate the arrest or taking to police headquarters of Respondent, though such action may have resulted from Billingsley calling the policemen. Such policemen testified undisputedly, however, that their action was not even occasioned by what Billingsley said and that they acted on their own judgment in view of the circumstances. Even if their judgment was wrong and their conduct unjustifiable, the Petitioners should not be held responsible therefor. The opinion of the Circuit Court of Appeals upon this question is not only contrary to every reported case but stands alone in American Jurisprudence.

POINT 5.

The Decision of the Circuit Court of Appeals Is Contrary to Applicable Decisions of Other Circuits.

Waters v. *Anthony*, 20 App. D. C. 124, *Yakahashi* v. *Hecht*, 50 Fed. (2) 320, 60 App. D. C. 176; *Kinchlow* v. *Peoples Rapid Transit Co.*, 88 Fed. (2) 764, 66 App. D. C. 382, certiorari denied, 301 U. S. 693, 81 L. Ed. 1349; *Telephone Company* v. *Lewis*, 99 Fed. (2) 424, 69 App. D. C. 191. In each of the foregoing cases, it is held that it is the right and duty of any citizen to direct the attention of an officer to the facts in a case and no liability is imposed on the party so informing the officer where such officer is free to use his own judgment and does not act under the compulsion of the informant.

POINT 6.

Petitioners Rule Requiring the Purchase of a Ticket by an Intended Passenger Between One and Seven A. M. Was a Valid Regulation under the Laws of the State of Mississippi, and the Determination thereof Presents a Question of Law and Not a Question of Fact for the Jury.

Central Louisiana Power Company v. *Thomas*, 145 Miss. 358, 110 So. 143; *Mississippi Power Company* v. *Byrd*, 160 Miss. 71, 133 So. 193; *Cosplich* v. *Miss. Power Company*, 164 Miss. 88, 144 So. 38; *G. M. & N. R. Company* v. *Nason*, 174 Miss. 43, 162 So. 85; *Mitchell* v. *Southern Railway Company*, 77 Miss. 917, 27 So. 834; *Teche Lines, Inc.* v. *Lott*, 189 Miss. 490, 198 So. 292.

POINT 7.

Irrespective of the Validity of the Rule, the Respondent by the Payment of Twenty-five Cents Could Have Acquired a Ticket and Avoided the Annoyance and Inconvenience Complained of.

It was his duty, even if Respondent were wrong, to reduce his damages. The proof undisputedly showed that if the ticket was not used, he might present the same at the window and the price thereof would be returned to him. *Y. & M. V. R. Company* v. *Fields*, 188 Miss. 725, 195 So. 489; *Gilbert* v. *Crosby*, 160 Miss. 711, 133 So. 204; *Vicksburg Railroad Company* v. *Ragsdale*, 56 Miss. 456; *Railroad Company* v. *Eckles*, 64 Miss. 204; *Scott* v. *Green River Lbr. Company*, 116 Miss. 524; 77 So. 309.

POINT 8.

The Overwhelming Weight of the Testimony Established the Fact that the Respondent Was Notified by the Ticket Agent that He Must Acquire a Ticket or Leave the Station, and the Failure and Refusal of the Respondent to Acquire a Ticket Is the Sole Subject of Controversy and Occasioned His Removal Therefrom.

We have pointed out to the Court the validity of the regulation and the further fact that even if the regulation was illegal, the Respondent might have saved himself any trouble by purchasing the ticket, the price of which, twenty-five cents, would have been returned to him if the ticket had not been used. Not only that, the bus station was enclosed premises and if the Respondent was notified to purchase a ticket or leave the station, his failure to do so constituted a crime which would have justified his expulsion from the station and even his prosecution. Section 2411, Miss. 1942 Code, makes it a misdemeanor for a person to remain upon enclosed premises after having been requested to leave, a copy of the section is made Appendix to this brief. In the case of *King* v. *Weaver*, 157 Miss. 77, 127 So. 718, the Supreme Court of Mississippi held that a person violating this section was subject to criminal prosecution, and even if acquitted, the defendant was not liable for an arrest and prosecution thereunder. In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290, where the plaintiff on a former trial gave testimony contradictory of, and at variance with, his testimony at the second trial, and since under the laws of the State of Missouri his credibility was for the jury, the same rule would prevail in the Federal Court. This rule was followed in *Stoner* v. *New York Life Insurance Company*, 311 U. S. 464, 85 L. Ed. 284. Now, in this case,

we have the same state of facts but the Mississippi rule is just the reverse. Under the Law of the State of Mississippi, where right of recovery depends upon the testimony of one witness, and the rule is very strong where such is an interested one, and it shall appear that such witness has in a former trial testified to a contradictory statement of facts or given a contrary statement, recovery may not be had unless such witness is corroborated if the testimony of the witness is contradicted by convincing, disinterested testimony. In such case, it is held that the party upon whom the burden of proof rests has not sustained the burden, that the testimony of such witness is unreasonable and will not support a verdict, or that a verdict based thereupon would be contrary to the overwhelming weight of the testimony, or that a verdict may not stand upon a mere scintilla of testimony. Such question under the rules existing in Mississippi is one of law and not of fact for the jury. The following cases are directly in point: *Sykes* v. *State*, 45 So. 838, 92 Miss. 47; *Montgomery Ward & Company* v. *Windham*, (Miss.) 16 So. (2) 622; *Federal Land Bank* v. *Morris*, 11 So. (2) 210, 193 Miss. 873; *Truckers Exchange Bank* v. *Conroy*, 199 Miss. 301, 190 Miss. 242; *Jakup* v. *Lewis Grocery Company*, 190 Miss. 444, 200 So. 597; *Teche Lines, Inc.* v. *Bounds*, 182 Miss. 638, 179 So. 747; *Thomas* v. *Williamson*, 185 Miss. 83, 187 So. 220; *Y. & M. V. R. Company* v. *Lamensdorf*, 180 Miss. 426, 177 So. 50.

This case falls within the rule announced in *Stoner* v. *New York Life, supra;* and *Ruhlin* v. *New York Life, supra*, and we invoke the rule therein announced that the State law must be followed by the Federal Court. In this case, Respondent, being examined under the Federal Rules, testified to a state of facts, testifying fully and voluntarily in the presence of his counsel, completely exonerating the Petitioners from any liability whatsoever (R. 109-118).

He was not corroborated by any fact or circumstance in the case. Direct and disinterested testimony was introduced contrary to the testimony given by him at the trial. Wm. D. Billingsley (R. 52). The latter had left the employ of the company and was in the Military Service. Billingsley's Cross-examination, Supplemental Record; Fitzpatrick (R. 75); J. D. Hines, Jr., (R. 90); J. R. Smith, (R. 109); McNair; (R. 70). A friend of Respondent testified that he had told him that he had been to the station to spend the night, and when the policemen released him from the City Hall, Respondent walked straight back to the station, purchased a ticket and remained in the station until the arrival of the bus. No other conclusion could possibly be drawn but that the controversy arose over Respondent's refusal to purchase a ticket when he had every opportunity to do so. We respectfully submit that as a matter of law, under the decisions of the Supreme Court of Mississippi, the testimony of the Respondent is against the overwhelming weight of the testimony and no recovery could be had thereupon.

POINT 9.

The Petitioners Were Not Liable for Exemplary Damages and the Court of Appeals Committed Error in that Respect.

The Court of Appeals held that the District Judge should have submitted to the jury Petitioners liability for punitive damages. The evidence is undisputed that Billingsley did telephone the policeman to come to the station. According to his testimony, that of the Respondent when examined under the Federal Rules, that of the two policemen, Billingsley complained that the Respondent had refused to purchase a ticket. Respondent testified that Billingsley merely said to the policemen "This man has been loafing around here several days"; and that he did not

make any charge or any request of the policemen. The testimony is further undisputed that when the policemen came into the building and went to the mezzanine floor that the Respondent was sound asleep, Fitzpatrick, (R. 75-6); Hines, (R. 91). It would be so easy for Atkinson, being asleep, to have misunderstood what Billingsley said, especially in view of his previous testimony as to what Billingsley said. The testimony was further undisputed that Billingsley was not present when the policemen questioned or searched Respondent, did not know that the same took place, and assumed that Respondent was being merely ejected from the station for not acquiring a ticket. Supplemental Record, (R. 1-6). We submit as a matter of law that the Petitioners were not guilty of such conduct as justified the submission of the question of punitive damages to the jury. The decision of the Circuit Court of Appeals so holding is contrary to the following applicable Mississippi cases: *Y. & M. V. R. Company* v. *Hardy*, 55 So. 42, 100 Miss. 132; *Teche Lines, Inc.* v. *Lott*, 198 So. 292; 189 Miss. 490; *Y. & M. V. R. Company* v. *Mullen*, 158 Miss. 774, 131 So. 101; *Bounds* v. *Watts*, 159 Miss. 307, 131 So. 804; *McDonald* v. *Moore*, 159 Miss. 326, 131 So. 824; *Miss. Power Company* v. *Byrd*, 160 Miss. 171, 133 So. 195. The Supreme Court of Mississippi has in repeated cases, as in the foregoing, held that, as a matter of law, exemplary damages were not allowable. The Court held in the case of *Y. & M. V. R. Company* v. *Hardy* that exemplary damages were no part of the compensation to which the plaintiff was entitled, but was punishment for wrong doing in the interest of the public and the personal rights of the plaintiff were not involved. It will be noted that Circuit Judge Waller dissented and was of the opinion that the record did not show any basis for recovery of exemplary damages.

POINT 10.

The Court Was Without Authority under Federal Rules of Civil Practice to Reverse this Case Solely upon the Question of Exemplary Damages. There Should Have Been a General Reversal.

In this case, the court used the following language: "The judgment appealed from is affirmed on cross-appeal. It is also affirmed on direct appeal except as to the issue of punitive damages. On that issue, it is reversed and the cause remanded to the district court for trial *de novo*, and such further proceedings as are not inconsistent with this opinion."

Rule 59, Civil Procedure, contains the following language: "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States."

The Seventh Amendment to the Constitution of the United States contains the following language: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The court in its opinion purports to cite authorities sustaining its conclusions that the case may be affirmed as to the judgment for actual damages, with costs, and reversed as to exemplary damages, which would require the petitioners to pay the same, and then that the case be reversed to be tried on the question as to whether or not the peti-

tioners are liable for exemplary damages. It is needless to say that the authorities cited by the court do not sustain the conclusions arrived at. The court cites Moore, Federal Practice, Vol. 3, Page 3248. The text does not state any such rule, and the cases cited in Notes 11 and 12 dealing with the right of the court to grant a new trial for inadequate or excessive damages resulted in a general new trial, though of course the court has authority to require a remittitur as condition precedent to overruling an application for a new trial. The court cites *Schuerholz* v. *Roach*, 58 Fed. (2) 32. The decision does not support the announcement contained in the court's opinion. In that case, where there was a verdict for the plaintiff, though the damages were fixed at an inadequate amount, the District Judge was asked to grant a new trial upon the question of damages alone. This, he refused to do, and his action was affirmed in the last mentioned case from the Fourth Circuit where the court used the following language: "The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand for various reasons, as for instance if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court * * * it is a sound judicial and not an arbitrary

discretion which must be exercised. A failure in this regard is subject to revision." The court cites the case of *Gasoline Products Company* v. *Champlain,* 283 U. S. 494, which case not only does not sustain but is opposed to the conclusion reached by the Court of Appeals. It is very true that each of the foregoing cases were decided prior to the operation of the present Federal Rules. It is sufficient to say that there is no reported case where any such conclusion has been reached, and we submit that the action of the court in this respect should not be affirmed without full argument.

The question is one of great public importance. The rule certainly would not apply or justify a reversal upon the question of damages alone. Most certainly it would not require or justify a reversal upon the question of exemplary damages alone. In such case there should be a general reversal. Under the decision of the court, the case would need to be tried *de novo,* that is to say, every fact and circumstance considered by the District Court at the trial of the case would be relitigated. This would impose great injustice upon the Petitioners, if the judgment for actual damages should be affirmed by this Court and paid. Upon the question of the liability of the Petitioners for exemplary damages, every particle of the testimony admissible at the trial of the case on the merits might be introduced, and we submit that it cannot be said with any degree of certainty that a second jury trying the case upon the question of exemplary damages alone would be able to separate the actual damages from the punitive damages. At the second trial, the jury might not be satisfied that the Respondent recovered sufficient actual damages, and an alleged recovery for exemplary damages might be increased thereby; but not only that, as pointed out by the Court of Appeals, Fourth Circuit, *supra,* the verdict rendered in favor of the Respondent against the Petitioners in this case covered every element of actual damages. It is very likely

that there was some disagreement among the jury about the question of Petitioners' liability at all. It is safe to assume that the verdict was a compromise verdict. Therefore, the Petitioners should not be subjected to the injustice of a trial with the same evidence only upon the question of exemplary damages where it may be that a majority of the jury would not even want to award any actual damages. We submit that there is no authority for any such practice and a writ should be granted and the Petitioners heard thereupon.

Rule 59, properly construed, means, we respectfully submit, that there may be a reversal as to some separable point in the case not requiring a trial *de novo,* and the trial of which would not embarrass or injure the opposing litigant by going over the same ground litigated in the former trial. No more species of judicial injustice could be conceived than that justified by the rule announced in this case that the Petitioners pay the actual damages with costs, and then run the gauntlet of litigating the entire case over again *de novo,* with the same proof admissible, leaving it to a different jury to determine, under the guise of exemplary damages, as to whether or not the Petitioners have paid adequate actual damages by reason of the former verdict rendered. We respectfully submit that the writ should be issued upon every ground hereinbefore presented with deference, Rule 38, Paragraph 5(b), of the rules of the court.

Respectfully submitted,

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APPENDIX.

ATKINSON v. DIXIE GREYHOUND LINES, INC.

125 F. 2d 237

McCORD, *Circuit Judge:*

Lamar C. Atkinson brought suit jointly against Dixie Greyhound Lines, Inc., and Teche Lines, Incorporated, for wrongfully causing his seizure, arrest and imprisonment. The case was tried to a jury, and at the close of the evidence for the plaintiff the court granted the defendants' motion for a directed verdict, and entered judgment accordingly.

In January, 1940, Dixie Greyhound Lines, Inc., and Teche Lines, Incorporated, operated passenger busses running to and from Jackson, Mississippi, on regular schedules. The two companies maintained and used the same terminal depot in Jackson, and used the same ticket agent, the same telephone, and other jointly maintained conveniences.

Atkinson was employed in a grocery store in the City of Jackson. He and his family lived approximately seven miles south of the city, and each day when his work was over he usually went to the bus depot and boarded the 8:15 bus for his home. He testified that he had been riding to his home on the bus almost every night for three months; that on January 27, 1940, he worked at the store from seven in the morning until eleven-thirty that night; that after closing the store, he took a bag of groceries which he had purchased and went to the coffee shop of a downtown hotel to eat supper; that he ate supper and then walked from the hotel to the bus station, arriving there about 1:15 A. M.; that he was not sure when the next bus left, but was under the impression that he could get a bus about 1:45 A. M.; that when he arrived at the station, he went directly to the ticket office; that he had the bag of groceries in one hand, and put his other hand in his pocket and drew out a one dollar bill with which to purchase his ticket; and that the agent on duty was busy writing. Atkinson inquired of the ticket agent, "What time does the bus go?" The agent glanced up and said, "You have plenty of time. You have until 4:30." Appellant waited a short time, and as the agent kept

writing he walked over and sat in one of the seats provided for waiting passengers. The waiting room contained more than fifty seats, and many of them were vacant at the time. Later on, Atkinson went upstairs to the balcony for the purpose of going to the men's lavatory. When he came out of the lavatory, he sat in one of the seats provided there for passengers.

Atkinson further testified that about two o'clock, and while he was sitting in one of the seats on the balcony, the ticket agent "comes by there and asks me what I was doing, what direction I was going in. I told him I was going south to Byron, and he asked me did I have a ticket. I said, 'No, I haven't got a ticket but I am ready to get one now.' He said, 'Well, you have until 4:30 in the morning to get it. The bus leaves at 4:30 in the morning. That is the next bus going South.' When he told me that, he turned away and just left me with the impression that I had until 4:30 the next morning to get my ticket."

About three o'clock in the morning two uniformed police officers came upstairs and began talking to a passenger who sat near Atkinson. The ticket agent came up and informed the officers that they were talking to the wrong man, and he then pointed to Atkinson and said that he was the one who had been loafing at the depot for about a week. The officers approached Atkinson and questioned him. Atkinson stood up, and as he attempted to pick up his sack of groceries, one of the officers seized him and the other officer searched him. He was told that he was under arrest, and the officers then led him down the stairs, through the waiting room, and ejected him from the station. After removing him from the station, the officers placed him in a car and took him to police headquarters. When Atkinson arrived at the police station, the two officers and the Desk Sergeant questioned him for several minutes. He was then placed in an adjoining room and held for two hours, and was released when an officer who knew him came in and identified him. Appellant then took his bag of groceries and walked back through the cold and the snow to the bus terminal. He found that the 4:30 bus has gone, and he then had to wait until about nine

o'clock that morning when he caught another bus and went home to his family.

The evidence is without dispute that the ticket agent called police headquarters and requested officers to come to the depot and eject the appellant. The ticket agent testified:

"Q. I believe you testified, did you not, that you had positive instructions from your employer that people should not stay in the depot with no obvious reason to be there at the station?

"A. That is right.

"Q. So it was discretionary with you as to whether or not you should call police headquarters and ask for assistance?

"A. Yes, sir.

"Q. To put people out?

"A. Yes, sir.

"Q. In other words, that was part of your duty as employe of the companies to see that people are put out when you think they are violating some city ordinance or some law?

"A. When there is just reason.

"Q. The officials of the company authorize you to do that?

"A. Yes, sir.

"Q. That is what you were doing on the occasion you called police headquarters to come to the depot and take charge of Lamar Atkinson?

"A. Yes, sir.

When the seizure and arrest of appellant was made at three o'clock in the morning, the night was intensely cold, with ice and snow covering the ground. It is clear that while Atkinson was in the depot, he was sober, and was deporting himself in a quiet and peaceful manner, *a* and that this conduct obtained until he was placed under arrest and removed from the station. Several persons were in the depot and saw the officers eject the appellant, and he testified that after his arrest he was questioned about the occurrence by a number of people; that he did not mention his having been arrested and put out of the station until

he was asked about it by different persons; that when he applied for work he was asked if he had ever been arrested; that he was humiliated; that he had never loafed about the depot of the defendant bus lines; and that he had never been arrested until this time.

(1, 2) The trial court erred in holding that as a matter of law the relationship of carrier and passenger did not exist between Atkinson and the defendant bus companies. Railroad and bus depots are established and maintained for the accommodation of passengers, and when an intending passenger avails himself of the convenience and presents himself in a proper manner and within a reasonable time before the arrival of his bus or train, "such person, while on the depot grounds or in the waiting room, is a passenger, and entitled to all the protection of a passenger." Metcalf v. Y. & M. V. R. R. Co., 97 Miss. 455, 52 So. 355, 356, 28 L. R. A., N. S., 311. Whether the passenger-carrier relationship to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters * * *." American Jurisprudence, Vol. 3; State Life Ins. Co. of Indianapolis v. Hardy, 195 So. 714; Schuerholz v. Roach, 58 F. (2) 32; Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494; Moore's Federal Practice under the New Federal Rules, Vol. 3, page 3248; Federal Rules of Civil Procedure, Rule 59 (a), 1938 Ed. p. 125.

By its verdict the jury found (1) that plaintiff was in defendants' bus station as a passenger at the time he was arrested and was not a trespasser; (2) that he had committed no offense and that his arrest was wrongful; (3) that Billingsley was the agent of the defendants when he called in the police and was then and there acting within the line and scope of his employment; and (4) that defendants were liable for the acts of Billingsley and the police officers for the wrongful arrest and imprisonment of plaintiff.

From what we have said, it is patent that the court erred in refusing, under proper instructions, to submit to the jury the question of punitive damages, that is: Did Billingsley in and about the arrest and imprisonment of plaintiff act with such reckless disregard of the rights of the plaintiff as measured to wanton or willful misconduct? This is a jury question under the facts of this case. It will also be relevant to prove the financial worth of defendants. Whitfield v. Westbrook, 40 Miss. 320; Wagner v. Gibbs, 80 Miss. 63.

The judgment appealed from is affirmed on cross appeal. It is also affirmed on direct appeal except as to the issue of punitive damages. On that issue, it is reversed and the cause remanded to the district court for trial de novo, and such further proceedings as are not inconsistent with this opinion.

WALLER, Circuit Judge, dissenting:

I do not believe that the evidence in this case reveals any facts that would justify the submission of an issue of punitive damages to the jury, and I therefore dissent.

McCORD, Circuit Judge:

This is the second appeal of this case. The evidence on the first trial and as found in this record is substantially the same. A full summation of the evidence can be found in Atkinson v. Dixie Greyhound Lines, et al., 125 F. (2d) 237. No good purpose can be served by setting out the facts at length.

Upon remand the case was tried to a jury and recovery limited to compensatory or actual damages. The court declined to submit to the jury the question of punitive damages, and the jury returned a verdict for plaintiff for actual damages in the sum of $500. The plaintiff appealed on the one ground that the court erred in refusing to submit to the jury the question of whether punitive damages should be awarded. The defendants have cross-appealed.

The evidence of the defendants showed that plaintiff entered the bus station of defendants at Jackson, Mississippi after midnight and upon request failed and refused

to purchase a ticket, and upon his refusal two police officers were called in and plaintiff further refused to purchase a ticket and he was then arrested and ejected from the station and removed to police headquarters. The jury declined to follow this evidence. The jury followed the evidence of the plaintiff. The plaintiff's evidence showed that he worked in a grocery store in Jackson, Mississippi on a Saturday in January, 1940 until 11:30 that night, having worked over sixteen hours; that when he left his work he went to a coffee shop and ate supper and then entered the defendants' bus station at about 1:15 in the morning; that he went immediately to the ticket window to purchase a ticket to his home at Byron, which was about seven miles south of Jackson, the price of the ticket being 26 cents; that he had a large sack of groceries in one hand and in the other a one dollar bill with which to purchase the ticket; that the agent was busy writing and upon being advised that plaintiff would purchase a ticket to Byron informed him that the bus did not run in that direction until 4:30 that morning; that he made no move to wait upon plaintiff and thereupon plaintiff took a seat in the waiting room; that later he went up to the balcony to the men's toilet and then seated himself in a seat on that floor which was provided for passengers; that later on Billingsley, the agent of the defendants, came to the plaintiff and asked him where he was going and when told said, "You have until 4:30" and turned away; when plaintiff made an effort to again purchase a ticket the agent said, "You have until 4:30" and plaintiff kept his seat.

Later two police officers who had been summoned by Billingsley entered the bus station and Billingsley pointed out the plaintiff and informed the police that plaintiff had been loafing in the depot for about a week; the officers thereupon seized plaintiff and arrested and searched him and removed him from the bus station to the police headquarters where he was held for about two hours and then released and given his bag of groceries and he walked back through the snow to the station and found that his bus had gone; he waited until 9 o'clock when he boarded another bus and returned to his home. The evidence further showed that plaintiff had been working at Jackson for three months and

had been buying tickets at the bus station and riding to his home nearly every day during that time; that he had never been arrested before; that he was sober on the occasion and presented himself at the station in a proper manner; that his deportment and demeanor at all times were correct and good; that he was a passenger of defendants as he was in their bus station waiting for his bus; and he was humiliated since many people knew of his arrest and imprisonment and that it would militate against him in the event he sought new employment.

The evidence is without dispute that Billingsley was the agent of the defendants and was at the time of the arrest in charge of the bus station and acting within the scope and line of his employment.

The witness, Emory, who testified for the defendants, was permitted to go entirely out of the record. The questions propounded to him, in the main, called for conclusions and brought forth answers which were erroneous and prejudicial. This witness was permitted to further testify that "If he refused to buy a ticket, he (the agent) has instructions to call the police * * * It is his duty to call the police, and we abide by the police decision."

The defendants may not escape liability for the wrongful acts of their agent or by passing responsibility to the police. If the agent and police were wrong, then their wrongs became the wrongs of the defendants. 35 A. L. R. 645; King v. U. C. R. R., 13 So. 824; Bacon vs. Bacon, 76 Miss. 458; Howell v. Vierner, 179 Miss. 872; A. & V. Ry. Co. v. Kuhn, 78 Miss 114; Laster v. Chaney, 177 So. 524.

Punitive damages: To authorize the infliction of punitive damages, the wrongful act complained of must be either intentional, or result from such gross disregard of the rights of the complaining party as amounts to willfulness on the part of the wrongdoer. Illinois Central R. Co. v. Ramsay, 127 So. 726; Chicago, St. L. & N. O. R. R. Co. v. Skurr, 59 Miss. 456; Mississippi & T. R. R. Co. v. Gill, 66 Miss. 39; New Orleans & N. E. R. R. Co. v. Martin, 140 Miss 410.

"Punitive damages may be recovered not only for willful and intentional wrong, but for such gross and reckless negligence as is equivalent to such a wrong. A spirit of wantonness and recklessness is at war with good faith. An act

done in such a spirit oftentimes is just as harmful as if prompted by malice." Neal v. Newburger, 123 So. 863; Edward Hines v. Imperial Naval Stores Co., 101 Miss. 802; Godfrey v. Meridian L. & R. R. Co., 101 Miss. 565; Vicksburg Waterworks v. Dutton, 99 Miss. 209.

That a case of false arrest or malicious prosecution in Mississippi can be such as to call for the infliction of punitive or exemplary damages is not longer in doubt. When an arrest has been made and imprisonment imposed and the evidence shows no legal grounds therefor, such conduct has been characterized as such gross wrong to evince a wanton or willful disregard of the rights of others, and if so, then the question of punitive damages under proper instruction by the court becomes a question for the jury. Laster v. Chaney, 177 So. 524; Bounds v. Watts, 131 So. 804; Illinois Central v. Ramsay, 127 So. 725; 25 C. J. page 551, Par. 161; Southern Railway Co. v. Hall, 96 So. 73; Electric Power Co. v. Wynne, 149 Va. 882; Stewart v. Sonnenborn, 96 U. S. 187; Taggard v. Patterson, 181 So. 137.

"It is now well established, notwithstanding doubt expressed in some earlier cases as to the common-law power of a reviewing court to limit issues when ordering a new trial, that when error exists as exists, depends, not upon the purchase of a ticket, but upon all the facts and circumstances of the particular case. 10 C. J., Carriers, 1039, 1040-1042; 13 C. J., Carriers, 554, et seq; Thomas v. Bush, Mo. App., 200 S. W. 301; Kidwell v. Chesapeake & O. Ry. Co., 71 W. Va. 664, 77 S. E. 285, 43 L. R. A., N. S., 999.

(3, 4) Viewing the evidence, as we must, in the light most favorable to the appellant, it is clear that Atkinson presented himself at the station in a proper manner; that he approached the ticket agent with money in his hand to buy a ticket; that the agent told him the bus didn't leave until 4:30 A. M.; that he took this statement of the agent to mean that he could remain at the depot until that time; and that upon being questioned by the agent at a later time he expressed a willingness to buy a ticket, and the agent told him he had until 4:30 to get one. Cf. St. Louis Southwestern R. R. Co. v. Griffith, 12 Tex. Civ. App. 631, 35 S. W. 741. It was for the jury to weigh the evidence and ascertain whether At-

kinson was a passenger, whether he had presented himself in a proper and reasonable manner, and whether he was entitled to sit in the bus depot and wait for the bus. The testimony clearly made a case for the jury, and the court erred in directing a verdict for the defendants.

(5) The appellee contends that from the evidence in the case it is apparent that the plaintiff could not have expected to recover as much as $3,000, and that, therefore, the federal court is without jurisdiction. The sum claimed in the pleadings of the appellant is far in excess of the minimum jurisdictional amount, and it does not appear that his claim was colorable or otherwise made in bad faith. The requirements as to jurisdiction were met. St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Section 7856, Mississippi 1942 Code, is in the following language:

> "How Rooms To Be Kept Open.—Every railroad shall keep rooms open for the reception of passengers at all passenger stations at least one hour before the arrival, and one-half hour after the departure, of passenger trains; and all reception rooms shall be made comfortable, and shall be kept in a cleanly and decent condition, and properly heated when necessary, and properly lighted at night. The agent or person in charge shall preserve order, and, if necessary, eject any person whose conduct is boisterous or offensive."

Section 2411, Mississippi 1942 Code, is in the following language:

> "Trespass—Going Upon Inclosed Premises of Another.—If any person shall go upon the inclosed land of another without his consent, after having been notified by such person or his agent not to do so, either personally or by published or posted notice, or shall remain on such land after a request by such person or his agent

to depart, he shall, upon conviction, be fined not more than fifty dollars for such offense. The provisions of this section shall apply to land not inclosed where the stock law is in force."

(3806)